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Lincoln County Case No. 182-00081-22

WASHINGTON COURT OF APPEALS, DIVISION III

LINCOLN COUNTY,

Appellant,

v.

TEAMSTERS LOCAL 690,

and

PUBLIC EMPLOYMENTS RELATIONS COMMISSION,

Appellees.

**APPELLANT LINCOLN COUNTY'S
REPLY BRIEF**

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I. INTRODUCTION

Elected officials, Lincoln County Commissioners (“County”) want to open their collective bargaining sessions to the public. The officials wanted to do so because collective bargaining contracts are expensive, the officials are proposing a tax increase, and they want to show the public how they are spending public funds. However, a private labor union does not want the public to observe how the officials are representing the public in negotiations, claiming opening meetings is an unfair labor practice. Who prevails? The answer is obvious: the public officials do.

Teamsters 690 (“Teamsters” or “union”) disagrees, and asks that the Public Employment Relations Commission (PERC) decision below be overturned in favor of a rule closing all bargaining sessions to the public statewide. The County also asks that PERC’s decision be overturned, but by far more modest means: a rule that opening or closing meetings to the public is a decision for the elected officials to make—either because the PECBA does not touch upon open or closed meetings at all (the PECBA does not preempt Transparency Resolutions), or because opening or closing meetings to the public is a public employer prerogative (under the PECBA’s prerogatives doctrine).

II. COUNTER-STATEMENT OF FACTS

While reserving the right to contest all facts alleged in Teamsters 690's briefing, the County does not do so now except as to note the following:

Teamsters 690 claims there is a dearth of documentary evidence linking the Commissioners' tax increase with the Transparency Resolution. See Union Response Brief at 7, fn. 16. This is not accurate.

Commissioner Coffman testified as to an "Exhibit 19" during the testimony taken by Hearing Examiner Jamie Siegel. AR at 645, 703. Exhibit 19 is the text of a notification the County sent to departments around the time the Commissioners passed the Transparency Resolution. The notification explains the relationship between the Transparency Resolution and the tax increase. AR at 707. It states, in part:

The Board of Lincoln County Commissioners has agreed, by adopting Resolution 16-21 (sic), that the union contract negotiations will be conducted in open public meetings.

...

We are appealing to the public (Proposition #1, 3/10's of 1% Sales Tax increase for Public Safety) and asking them to open their wallets and give us more of their hard earned money.... *By asking the public for more money, it is imperative that this board to make (sic) every attempt to be transparent,* as to maintain the highest level of trust with the people of Lincoln County.

Exhibit 19, AR at 645 (italics added); see AR at 703-707.

The link between the tax increase and the Transparency Resolution is sufficiently corroborated.¹

III. ARGUMENT IN REPLY

A. SUMMARY OF ARGUMENT IN REPLY

Teamsters urges this Court to close collective bargaining to the public because, according to it, closed bargaining “more surely advances the State’s legitimate interest” in good faith collective bargaining. Union Response (“Union Response) at 1. This is the lynchpin of its argument. But this is an unprovable statement, because what constitutes ‘better’ collective bargaining is a decision that must be made by the legislature, elected officials, and the people who elect both. Teamsters does offer essentially two legal rationales for getting to its result, but neither withstands serious scrutiny. The Open Public Meetings Act (OPMA) does not preempt open meetings any more than it requires closed meetings by any stretch of legal reasoning or imagination, and the past practice of the parties to negotiations, if any here, does not control in the case of nonmandatory subjects.

¹ The content of Exhibit 19 was included, verbatim at parts, in at least one public posting from the Commissioners to the public, published with The Odessa Record newspaper. See CP at 271 (“By opening our contract negotiations to the public, we believe it will better help everyone understand our financial situation, especially since we are appealing to the public this November (in Proposition #1, three-tenths of one percent sales tax increase for public safety funding) and asking you to open your wallets and give us more of your hard-earned money.”), also available at <https://www.odessarecord.com/story/2016/10/06/opinion/commishs-corner/4580.html> (last visited January 8, 2020)

This Court should reject the union's invitation to close bargaining sessions to the public statewide. Instead, this Court should affirm PERC's decision insofar as it found that the union committed an unfair labor practice by demanding that the County bargain behind closed doors, reverse PERC's finding that Lincoln County committed an unfair labor by abiding by its Transparency Resolution, and affirm the right of local governments to conduct their collective bargaining meetings under the OPMA.

The rationales the County offers to get to this desired result are sound. First, PERC erred by issuing a cause of action against the County when it abided by its Transparency Resolution, because the Public Employees' Collective Bargaining Act (PECBA) does not touch (preempt) open or closed meetings at all. Second, and in the alternative, PERC erred because, under the PECBA, opening meetings to the public is a managerial prerogative "at the core of entrepreneurial control" for elected officials.

This Court should reject the union's invitation to legislate over the substantive policy matter of open or closed meetings. Open meetings are preferable to closed as a matter of good policy, and no legal rationale supports closing meetings statewide.

B. THIS COURT SHOULD NOT CLOSE BARGAINING SESSIONS AROUND THE STATE BECAUSE, AT THE VERY LEAST, OPEN VERSES CLOSED MEETINGS IS A LEGISLATIVE ISSUE

Underpinning the union’s argument is its belief that when it meets with public officials to discuss public funds, its meetings should be behind closed doors.

Alleging supposed evils of open bargaining, it asks this Court to make a definitive rule that it is always better for elected officials to negotiate over the use of public funds privately with them, and not in the public’s eye. *See* Union Response at 22-27. Thus, for example, the union cites to NLRB and PERC decisions opaquely referencing “numerous experts in the field” supposedly supporting its position, offers airy bromides of how “the free exchange of ideas and possibilities...” is promoted behind closed doors, and relies on the assurances of Mr. Kuhn,² its “exceptionally experienced labor negotiator,” who tells the Court categorically that “breakthroughs [in negotiations] would never occur” if negotiations were public.³ *Id.* at 23-27

² The County does not mean to deride Mr. Kuhn or his experience as a labor negotiator. Mr. Kuhn’s testimony may be valuable, but it is the kind of testimony that would be better before a legislature.

³The County has, in fact, addressed each of the union’s proffered cases, case by case, in briefing below. *See* AR at 152-54 (County’s Response Brief before PERC). The cases are inapposite for a number of reasons. Most of them are simply taken out of context. But the ultimate problem with the union’s argument is that reasonable minds differ on policy matters such as these. *See generally, e.g., Bakery Workers Local 455 (Nabisco Brands), 272 NLRB 1362 (1984), infra.*

(emphasis added). In this vein, the union creates an anecdote out of Sheriff Magers' request to discuss a matter irrelevant to the collective bargaining agreement in private, and touts this as proof of the alleged unworkability of the County's openness policy.⁴ Union Response at 11.

It is difficult to imagine a more self-serving, self-fulfilling, and ultimately unprovable argument than this, however. The argument essentially boils down to "trust us," with an odd NLRB or PERC decision obliquely supporting its views. But "trust us" should not be enough to close the doors of all collective bargaining sessions statewide.

Perhaps the most definitive guidance this Court can lean on in is this case is the underlying PERC decision itself. PERC, which exists to "promote the continued improvement of the relationship between public employers and their employees," did not believe that closed meetings were essential to bargaining. RCW 41.56.010. Instead, it acknowledged the arguments on both sides, including to the trend for transparency, but ultimately concluded that "other than requiring the parties to negotiate in

⁴ This hairsplitting and anecdotal method of arguing against all Transparency Resolutions is suspect. The union cannot possibly expect this Court to ban *all* open bargaining because, here, a non-member of the bargaining team possibly disregarded a distinction whether a subject would be incorporated into the collective bargaining agreement, or was instead a matter of policy application. Moreover, even if this anecdote were taken to show some of the difficulties that may arise with open bargaining, this specific instance is addressed easily. Spokane County's Transparency Resolution, for example, does just that: "Spokane County bargaining representative (sic)... shall be permitted to meet privately with union representatives if solely discussion issues pertaining to specific Spokane County personnel." CP at 910.

good faith, Chapter 41.56 RCW does not prescribe how parties will bargain.⁵” AR at 17. If PERC, which regularly deals with public labor disputes, did not believe it demonstrably preferable to close meetings, this Court should not, either.

Finally, this restraint by PERC reinforces the County’s primary point: contrary to how the union likes to portray it, there is no clear unanimity on the subject of open meetings. The fact that some tribunals or jurisdictions may have expressed disapproval for open meetings merely demonstrates the breadth of opinion on this issue, and is contrasted with the numerous jurisdictions that have opened their meetings to the public, and the rising tide of transparency in Washington. See County’s Brief at 27. This is a reason for recognizing local governments’ discretion in opening their meetings, not against. This is a reason for respecting the principle of “home rule,” the fact that County Commissioners are in touch with the conditions and needs of their electorate, and the dignity of local boards and councils. See Opening Brief at 21-22.

⁵ This Court should never lose sight of the fact that the PECBA requires the parties to bargain in good faith at all times, regardless of the circumstances. See RCW 41.56.140, .150. This is important because if, for example, any party to negotiations were to use any aspect of negotiations (including open meetings) to humiliate, harass, intimidate, delay, or otherwise compromise the bargaining process, these acts would be independent violations of the PECBA. Notably, there is no evidence of bad behavior on the part of the County (or union) using open meetings in a nefarious way to obstruct the bargaining process. The union makes only a generalized allegation that the County *must* have passed the Transparency Resolution in bad faith. See, *infra*, sec. 6, below.

Ultimately, it is the elected representatives whom the voters hold responsible for how well collective bargaining functions, not biased union officers. Letting the persons who actually will pay a penalty for being incorrect, to determine whether open or closed bargaining is more effective, is superior policy. This Court should recognize that opening collective bargaining sessions to the public is a legitimate (indeed, beneficial) policy choice, and decline to close them.

C. TEAMSTERS (AND PERC) FUSES TWO LABOR LAW CONCEPTS TO ARRIVE AT IT'S DESIRED RESULT ALLOWING IT TO FORCE THE COUNTY TO BARGAIN IN PRIVATE

The County and the Union agree that PERC's decision is in error. See Union Response at 14-16. Moreover, while the parties disagree on how to characterize open meetings, the parties agree that, with respect to the PERC order, the "issue before... this Court... [is] which party should prevail in the absence of agreement" on the subject. See Union Response at 17.

To the extent that the union relies on labor law concepts in an attempt to answer this question, the union argues the fusion of two inapposite rules: the past practice determinative doctrine (derived from mandatory subjects), and permissive subjects. It is well established that parties' past practice determines outcome in the case of disagreement over mandatory subjects. See Opening Brief at 37-42. But there is no authority that Teamsters can

rely on to show where past practice actually dictated the outcome over an agreement around a permissive subject of bargaining. Indeed, Teamsters is fairly candid about this conspicuous gap. See Union Response at 20 (“...the Hearing Examiner and the Commission cite no PERC or other cases specifically addressing this subject....”). Instead, the union offers two NLRB cases in which the subject is analyzed, in dicta, but no decision on the subject is made. Each cited case will be taken in turn:

Teamsters 690 cites to dicta in *Aggregate Industries v. NLRB*, 824 F.3d 1095 (D.C. Cir. 2016), to support its proposition that the status quo governs this permissive subject. In *Aggregate Industries*, a private industrial employer and a union reached bargaining impasse over whether drivers should be moved from different sites in the business. Unable to reach agreement, the employer unilaterally implemented the change it desired. The union argued that the change was a permissive subject, because it is illegal to reach impasse over a permissive subject and then use this impasse to justify making unilateral changes affecting wages, hours, working conditions—which the employer’s decision to move drivers’ work locations unquestionably did. The D.C. Court of Appeals decided that the subject was a mandatory one, however, and the employer was authorized bargain to impasse over it, and make the changes.

Aggregate Industries is inapposite and does not actually support the union's position. The issues are completely different, the effect of the changes had an obvious effect on "wages, hours, working conditions," and there is no discussion of prerogatives or public transparency.

Teamsters stretches a footnote and dicta from *Aggregate Industries* almost to the point of unrecognizability to make its argument, and PERC did not rely on it. In the dicta, the D.C. Court of Appeals makes a statement that "[a] unilateral change to a permissive subject of bargaining is illegal." *Id.* at 1099. But, taken out of context, this is simply not correct under PECBA (or NLRB) law. See *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 185-186 (1971) ("PPG") (A unilateral "'modification' is a prohibited unfair labor practice *only when it changes a term that is a mandatory* rather than a permissive subject of bargaining."(emphasis added); *Pall Corporation v. NLRB*, 275 F. 3d 116, 119 (D.C. Cir., 2002) ("The Act does not prohibit... the unilateral change of terms concerning permissive subjects.") (citations omitted). That is why the D.C. Court qualifies its statement in a footnote. The footnote identifies the confusion in the area, and also serves to reinforce the County's position that past practice relates only to mandatory subjects:

Sometimes these terms appear to imply quite the opposite. In some cases, the Board has used the terms to mean that a party may decline to bargain about a proposal precisely because that party has authority to decide the issue unilaterally. The difficulty is that the terms “permissive” and “nonmandatory” imply that the parties need not bargain, but they do not determine whose position prevails in the absence of bargaining.

Id. at 1099 fn. 4 (emphasis added). It is indeed true that the terms “permissive” and “nonmandatory” do not “determine whose position prevails in the absence of bargaining.” *Id.* PERC and the NLRB employ other labor law principles—i.e. the prerogative doctrine—to resolve this issue. See sec. 4, *infra*.

Teamsters 690 next cites to *Island Architectural Woodwork, Inc. v. NLRB*, 892 F.3d 362 (2018), which cites the *Aggregate Industries* dicta. See Union Response at 21. This decision is equally unhelpful. In *Island Architectural*, the NLRB held that two ostensibly separate entities were alter egos, and as a result, they committed an unfair labor practice when the entity whose employees were represented by a union unilaterally transferred bargaining unit work to the other entity and failed to apply the terms of the collective bargaining agreement to those employees. *Island Architectural*, 892 F. 3d at 366-371. The context of that dispute could not be more divorced from the issues at hand, and the portion of the opinion on which the Union apparently relies does not support its theory.

In *Island Architectural*, the union argued that the employer committed an unfair labor practice by “insisting on agreement regarding ‘permissive’ subjects of collective bargaining as a condition of reaching any agreement on ‘mandatory subjects.’” *Id.* at 376. That is not what happened here. On the contrary, the parties reached agreements on a number of subjects before the Union walked out of the last bargaining session. AR at 721, 723-24, 867-74. The County did not condition agreement “regarding mandatory subjects on acceptance of a particular position on a permissive subject.” *Island Architectural*, 892 F. 3d at 376.

This dicta is contrary to the force and weight of established labor law. This is because the PECBA (and PERC) recognize that there are a host of matters that do not fall within the PECBA’s purview. Parties do not have a duty to bargain over permissive subjects of bargaining (though they must bargain the effects of those changes on wages, hours, working conditions, if any). See Opening Brief at 37-41. As emphasized in its opening brief, Opening Brief at 39, even PERC’s remedies jurisprudence demonstrates the PECBA’s low regard for the *status quo* in permissive subjects:

When an employer has refused to bargain the effects of a permissive subject of bargaining, the Commission has traditionally ordered effects bargaining without requiring the employer to undo the decision.... A status quo ante remedy is inappropriate when an employer has only failed to bargain the effects of a decision.

Port of Seattle, Decision 11763-A (PORT, 2014)⁶ (internal citations omitted).

Finally, it is worth emphasizing the holding of *Bakery Workers Local 455 (Nabisco Brands)*, 272 NLRB 1362 (1984), a case which the union relies upon for its argument that closed meetings are substantively preferable to open. Union Response at 24. In that case, the union demanded that the employer cede to its demand that negotiations continue to be tape-recorded before they would negotiate. *Despite eleven years' history of tape recording negotiations sessions*, the NLRB decided that the employer was right, and closed the meetings to recording. This case, alone, demonstrates that labor law cares not a wit for past practice when it comes to permissive subjects of bargaining.

Essentially, Teamsters asks this Court to affirm PERC's completely unsupported decision fusing the past-practice doctrine with permissive subjects, which would permit employees to prohibit their public employers from making changes to the permissive subject of open bargaining. The entire theory undergirding the PECBA is that the parties have an obligation to bargain over subjects regulating or significantly affecting wages, hours, and working conditions, but no duty to bargain other subjects. The

⁶<https://decisions.perc.wa.gov/waperc/decisions/en/item/179203/index.do?q=Decision+11763>

mandatory/permissive dichotomy establishes where the bargaining obligation begins and ends. Adapting D.C. Court of Appeals dicta and applying it so that one side is prohibited from changing how it conducts meetings turns this permissive dichotomy on its head. Permissive subjects are ‘permissive.’ While the proponent party cannot force the opposing party to agree to include permissive subjects in a contract, that does not mean that that opposing party enjoys veto power to prohibit the proponent party from doing something it otherwise is capable of doing (so long as the decision does not affect wages, hours and working conditions, which the Transparency Resolution does not).

PERC’s unsupported extension of the past practice doctrine to resolve this labor dispute was unreasonable—especially where the proper vehicle for resolving it is obvious.⁷

⁷ The union’s brief in Section VIII, Union Response at 46-48, argues that the past practice of the prior representative carries over to new ones. This is true in only the case of mandatory subjects, and all of the authority there involves cases in which the past practice of the prior representative carried over in the case of mandatory subjects. It fits in very well with the County’s arguments. At any rate, the union’s argument that the parties’ past practice was private makes for a poor showing. The union cites some email correspondence that the Commissioners sent before negotiations, and scheduling matters, Union Response at 48, and makes resort to “labor law nomenclature” to buttress its argument. But this attempt to stretch the meaning of “negotiation” should not succeed. Email correspondence to determine when or *if* negotiations will take place is not itself negotiations. *See* AR at 632, 633; *see also* AR 635-36 (emails working out dates to meet and negotiate).

D. OPENING (OR CLOSING) MEETINGS IS A PUBLIC EMPLOYER PREROGATIVE

The most circumspect way to resolve this controversy under the PECBA—allow for principles of comity applicable to another branch of government—is to conclude that opening (or closing) meetings to the public is a public employer’s prerogative. This is not only desirable as a policy outcome, but also the most comfortable resolution within the PECBA framework if this Court concludes that this controversy is a labor law issue at all.

In Section II of its argument, the union acknowledges that “permissive subjects falling within management’s prerogative can indeed be implemented unilaterally, without the union’s agreement.” Union Response at 18. Later, however, the union seems to suggest, indirectly, that the inquiry into whether closing or opening meetings is a managerial prerogative is foreclosed because managerial prerogatives are also permissive subjects. See Union Response at 45 (“[I]n our case, PERC has already ruled that the public/private issue is a permissive one....”). But, as the union acknowledges, prerogatives and permissive subjects are not mutually exclusive. Permissive subjects and prerogatives share the common factor of their relationship to wages, hours, and working conditions (they are both unrelated). But a subject that also is at the “core of entrepreneurial control”

is likely a managerial prerogative. *See Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Employment Relations Comm'n*, 113 Wn.2d 197, 203, 778 P.2d 32, 35 (1989) (internal citations omitted); *City of Seattle*, Decision 11588-A (PECB, 2013) (citations omitted);⁸ *see* Opening Brief at 32-37. Moreover, since PERC deals in particular with public employers, including elected officials, PERC “consider[s] the right of a public sector employer, as an elected representative of the people, to control management and direction of government.” *Bellevue School District*, Decision 12767 (PECB, 2017),⁹ 2017 WL 4539909, at *16 (citing *Unified School District No. 1 of Racine County v. Wisconsin Employment Relations Commission*, 81 Wis.2d 89, 95 (1977)).

After identifying this overlap, the union seems to think it can merely bypass any consideration of whether opening meetings is a public employer’s prerogative. The union completely fails to respond to the County’s arguments about why the decision to open meetings is, indeed, such a prerogative. *See* Opening Brief at 35-37.

But the union cannot bypass this issue so easily. It is undisputed that public employers enjoy public employer prerogatives. *See* Union Response

⁸<https://decisions.perc.wa.gov/waperc/decisions/en/item/179196/index.do?q=City+of+Seattle%2C+Decision+11588-A+%28PECB%2C+2013%29>.

⁹<https://decisions.perc.wa.gov/waperc/decisions/en/item/233987/index.do?q=Decision+12767+-+PECB>

at 18. Opening meetings to the public so that the taxpayers can observe how diligently elected officials are safeguarding limited resources is unquestionably the kind of policy decision going to the heart of the relationship between elected officials and the voters, and is a public employer prerogative under PECBA. *See* Opening Brief at 35-37.

E. THE OPEN PUBLIC MEETINGS ACT DOES NOT COMPEL PUBLIC EMPLOYERS TO CLOSE MEETINGS

Teamsters 690 argues that the Open Public Meetings Act (OPMA) preempts Transparency Resolutions by *requiring* officials to bargain in private with unions. *See* Union Response at 28. The union suggests something that would be anathema to the OPMA, and this argument lacks foundation in law, or logic.

The OPMA expresses the Legislature’s intent that government agencies’ “actions be taken openly and that their deliberations be conducted openly.” RCW 42.30.010. Its purpose is to “to allow the public to view the decision-making process at all stages.” *Cathcart v. Andersen*, 85 Wn.2d 102, 107 (1975). The OPMA safeguards democracy:

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.30.010. Courts liberally construe it to advance government transparency. *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 421, 435-36 (2017). Ambiguous provisions be construed in favor of government transparency, and in the case of multiple reasonable interpretations of an exception, tribunals must adopt the narrowest. *Id.*

The Union argues that this bulwark of government transparency requires collective bargaining to be conducted in private. Union Response at 25. The Union must be wrong.

1. Section 140(4)(a) is an exemption from a duty, not a reverse mandate to close meetings

RCW 42.30.140 exempts employers from the duty to open meetings. Reading it any other way is without foundation in logic. The Courts refer to § 140(4)(a) as a permissive exemption, not a mandatory prohibition. *ACLU of Wa. v. Seattle*, 121 Wn. App. 544, 554–55 (2004) (referring to § 140(4)(a) as an exemption); *Columbian Pub. Co. v. Vancouver*, 36 Wn. App. 25, 32 (1983) (“such closed meetings *may* be held by policy makers”) (emphasis added); see also *In re Recall of Bolt*, 177 Wn.2d 168, 177 (2013) (holding that an exception to OPMA “*allows but does not require* executive session”) (emphasis added). PERC has done the same. *City of Fife*, Decision 5645 (PECB, 1996) (concluding that “employer is incorrect, however, in claiming that the [OPMA] necessarily requires ratification of all collective

bargaining agreements at a public meeting prior to reaching and executing a collective bargaining agreement at a private collective bargaining session.”). The Municipal Research and Services Center describes § 140(4)(a) as an exemption.¹⁰

The union seems to contend that an exemption from a mandate becomes itself a mandate. But an exemption from a mandate is not a mandate. Another way of putting this is that an exemption from a duty to perform is not a prohibition on performing. That would be like arguing that tax filers who fall within the exemption from the duty of tax reporting are prohibited from filing tax returns. That would be absurd.

The union’s proposal violates the OPMA’s purpose, RCW 42.30.010, its interpretive mandate, RCW 42.30.910, and the ubiquitous judicial admonition that OPMA exceptions must be construed in the narrowest possible sense. *Columbia Riverkeeper*, 188 Wn.2d at 436.

2. Principles of field preemption do not support the union’s argument.

The union acknowledges that the OPMA does not claim to “occupy the field.” Union Response at 30. Thus, to seriously engage the union’s

¹⁰ *The Open Public Meetings Act: How it Applies to Washington Cities, Counties, and Special Purpose Districts*, WWW.MRSC.ORG, available at <http://mrsc.org/getmedia/275e74fc-9d43-4868-8987-a626ad2cea9f/opma14.pdf.aspx> (last visited January 13, 2020). Nonprofit MRSC provides legal and policy guidance on many topics to Washington local governments. See *About MRSC*, WWW.MRSC.ORG, available at <http://mrsc.org/Home/About-MRSC.aspx> (last visited January 13, 2020).

argument, the Court must consider “the purposes of the legislative enactment and to the facts and circumstances upon which the enactment was intended to operate.” *Lenci v. City of Seattle*, 63 Wn.2d 664, 669–70 (1964). As with any statutory construction, the principal endeavor is “to ascertain and give effect to the intent of the Legislature.” *City of Seattle*, Decision 4687-B (PECB, 1997). It is quite plain that the legislature had no intent to prohibit local governments from opening meetings if they wished to, or erect barriers to opening bargaining sessions to the public by exempting bargaining sessions from the OPMA’s mandate.

In *City of Seattle*, Decision 4687-B on which Teamsters 690 relies for its erroneous field preemption argument, PERC found that “[t]he Legislature’s use of absolute and preemptive terms ... indicate[d] an ongoing legislative intent to occupy the field.” *Id.* Because state pension law preempted the parties from bargaining supplemental pension provisions, it was not an ULP for the employer to refuse to negotiate that topic with the union. *Id.* Here, however, the OPMA contains no terms that suggest a preemptive intent. The union cites excerpts from the OPMA to support its argument, see Union Response at 31-32, but the union is merely citing the provisions setting forth the law’s structure – that open public meetings and the remedial enforcement provisions necessary to effectuate them shall be the norm for all public agencies in the state. But the underlying

purpose of the law would be undermined if the OPMA were held – for the first time – to preempt a local government’s decision to enhance its transparency. Such a rendering would transform the OPMA from a democratic safeguard into a law that instead empowers “public servants... to decide what is good for the people to know and what is not good for them to know.” See RCW 42.30.010.

Analogy to another preemption case is helpful. In *Lenci v. City of Seattle*, 63 Wn.2d 664 (1964), State law required that all wrecking yards maintain six-foot-high wall or fence around their perimeters. The city of Seattle went beyond these minimum requirements and required yards to build eight-foot-high walls—much to the chagrin of the wrecking yards. Plaintiffs, wrecking yards, argued that the Seattle ordinance violated State law. The Supreme Court disagreed. The State Supreme Court held that, even though six and seven-foot fences were now illegal under the local ordinance, the local ordinance did not conflict with State laws: “the fact that a city charter provision or ordinance enlarges upon the provisions of a statute, by requiring more than the statute requires, does not create a conflict unless the statute expressly limits the requirements.” *Lenci*, 63 Wash. 2d at 669-671(citations omitted, italics and underlining added). Here, the County’s Transparency Resolution enlarges upon the provisions of the OPMA by allowing for more transparency, thereby holding Lincoln County

to a higher standard than the OPMA requires. Moreover, the OPMA does not expressly prohibit the County from opening its meetings to the public.

Second, an analysis of the OPMA, generally, and RCW 42.30.140(4)(a), particularly, reveal no legislative intent to prohibit local governments from creating their own open government standards that may be broader than the OPMA. Courts must liberally construe the OPMA to advance government transparency. *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 421, 435-36 (2017).

3. The OPMA and the Transparency Resolution do not conflict.

The Union relies on *Bellingham v. Schampera*, 57 Wn.2d 106 (1960), for its argument that the OPMA conflicts with the Transparency Resolution. This reliance is a poor and misplaced application of that case. While *Schampera* contains the general language about when a local ordinance is preempted, the union's application is wrong.

In that case, the Court held that “[u]nless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail.” *Id.* at 111 (emphasis added). Local legislation conflicts with State legislation if it forbids what the State permits, or permits what the State prohibits.

The union's error here stems from its mistaken transformation of RCW 42.30.140(4)(a)'s exemption from a duty of transparency into a

positive prohibition against transparency. Under the union’s formulation, the OPMA ‘forbids’ open meetings and ‘permits’ closed meetings, thereby conferring a right to closed-door meetings. But the OPMA exemption RCW 42.30.140(4)(a) does not bestow any rights to unions, it merely relieves governments from the duty to make their meetings open to the public. Just as the State law regulating fence heights at six feet in *Lenci* did not forbid taller fences—and did not give wrecking yards a right to have only six-foot fences—so to the exemption under the OPMA neither forbids open meetings nor grants unions a right to private meetings.¹¹ The OPMA does not forbid elected officials to open their meetings to the public.

F. THIS COURT SHOULD REJECT THE UNION’S BAD ACTOR ARGUMENT OUT OF HAND-LIKE EVERY TRIBUNAL BELOW

This Court should reject the union’s argument that the Freedom Foundation nefariously influenced the County out of hand. Not only is there no evidence to support it, but this argument is completely undermined by the numerous jurisdictions that are choosing transparency—some of them with Resolutions nearly identical to that of Lincoln County. *Compare AR*

¹¹ The Union cites to *City of Fife* to suggest that the case demonstrates PERC’s understanding that the Legislature was seeking to prevent open collective bargaining. Union Response at 33-34. However, the Union fails to include PERC’s analysis immediately following, which demonstrates that PERC saw RCW 42.30.140(4)(a) as an exemption, not a prohibition on public bargaining. *City of Fife*, Decision 5645 (PECB, 1996).

at 560-61 (Lincoln County’s Transparency Resolution) *and* CP at 909-10 (Spokane County’s Transparency Resolution). Perhaps Freedom Foundation staff should be flattered that Teamsters ascribes such influence to them. But more likely is elected officials exercising their independent judgment, with the rising tide of transparency in bargaining in Washington State explained more succinctly by the text of numerous Transparency Resolutions themselves: that “transparent government is a top priority” for these jurisdictions, that “collective bargaining agreements are among the most expensive contracts negotiated” by these counties, and that “both taxpayers and employees deserve to know how they are being represented during collective bargaining negotiations....” *Id.*

G. REGARDLESS OF HOW THE DECISION IS CHARACTERIZED, PERC IN FACT DECIDED THAT THE PECBA PREEMPTS THE RESOLUTION

The union argues that the County mischaracterizes PERC’s ruling by arguing that PERC interpreted the PECBA to preempt the County’s Transparency Resolution. See Union Response at 38. But it is not necessary for PERC explicitly to state that “the PECBA preempts the County’s Transparency Resolution” for it to actually do so. By finding that the County committed an ULP by abiding by its Transparency Resolution, PERC in fact ruled that the PECBA preempts the Resolution. To suggest that PERC did not do so because PERC only invalidated the Resolution when the County

applied it is merely another way of saying that PERC invalidated the Resolution in an ‘as applied’ challenge, as opposed to a facial one. PERC did not invalidate the Resolution on a facial challenge. *See Lincoln County, Decision 12648 (PECB,2017); see also* Opening Brief at 7-9. PERC should not have invalidated the Resolution when the County applied it, either.

IV. CONCLUSION

Lincoln County presents the clearest and most obvious solution to this controversy: opening meetings to the public is not a matter regulated by the PECBA at all because it does not affect wages, hours, and working conditions. In the alternative, the County may decide to open meetings because such is a public employer prerogative. The union’s attempts to show otherwise fail. This Court should reverse the decision of the Public Employment Relations Commission, in part, and conclude that Lincoln County did not commit an unfair labor practice.

Respectfully submitted this 12th day of January, 2020.

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I certify under penalty of perjury under the laws of the State of Washington that on January 13, 2020, I filed this document with the Supreme Court in the State of Washington via the Appellate Court E-filing System, which will transmit a true and correct copy to the following:

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